Bungy Malaysia Sdn Bhd v Menara Kuala Lumpur Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D-24NCC-82 OF 2010
MAH WENG KWAI JC
10 AUGUST 2010

Civil Procedure — Injunction — Interlocutory injunction — To restrain defendant from obstructing operation of plaintiff's business pending arbitration proceedings — Whether serious questions to be tried — Whether balance of convenience lay in favour of plaintiff — Whether status quo of parties would be preserved — Whether granting of injunction would give plaintiff full and final relief sought at arbitration

Contract — Specific performance — Injunction — Whether contract could not be specifically enforced under s 20(1)(g) of the Specific Relief Act 1950

The plaintiff entered into a collaboration agreement ('the agreement') with the defendant, the lessee of the land on which the Menara KL Tower ('the tower land') is located, to set up and operate five adventure activities as part of phase 1 of the development at the KL Tower. It was a term of the agreement that the defendant would set up and implement the phase 2 activities concurrently with or after the commencement of the phase 1 activities at the defendant's cost. Under cl 3 of the agreement, the initial period of the agreement was three and a half years, which lapsed on 31 May 2009 ('the initial period'), with the defendant being granted an option to renew the agreement for two further terms of ten years each, subject to the lease of the land being extended in favour of the defendant. Upon the expiry of the initial period the defendant allowed the plaintiff to continue with its adventure activities, but by way of a letter of termination dated 9 December 2009 the defendant insisted that the plaintiff cease its business operations by 21 March 2010 and deliver vacant possession of the premises. As the defendant refused to allow the plaintiff to continue with its operations and as the defendant refused to commence and fund the phase 2 activities despite numerous reminders to this effect, the plaintiff gave notice to the defendant to refer the dispute to arbitration. Pending disposal of the arbitration proceedings the plaintiff sought the instant injunction to preserve the status quo of the matter. It was the plaintiff's contention that the true intention of the parties was to engage in a long term business relationship for a term of at least twenty three and a half years and that on a proper construction of the agreement and based on the conduct of the parties the defendant was estopped from terminating the contract by its notice of termination dated 9 December 2009. The plaintiff submitted that if the defendant were allowed to

violate the plaintiff's exclusive right to continue operation of the adventure activities and the plaintiff was compelled to remove all its installations and structures it would suffer irreparable damage but there would be no irreparable harm done to the defendant as there was no evidence that the tower land was being required for any other purpose. The defendant contended, inter alia, that the interlocutory injunction sought by the plaintiff was in effect an interlocutory mandatory injunction because the plaintiff sought to renew the agreement, which had already expired on 31 May 2009, by compelling the defendant to retract their notice not to renew the agreement; and that the granting of the injunction would give to the plaintiff the full and final relief sought to be obtained at the arbitration hearing. The defendant also submitted that the plaintiff was not relying on the agreement but on what the parties had intended before the agreement, and which in effect constituted a new and separate agreement different from the agreement executed by the parties. As such the defendant contended that the contract alluded to by the plaintiff could not be specifically enforced under s 20(1)(g) of the Specific Relief Act 1950 ('the SRA'), which stated that a contract cannot be specifically enforced unless it involved the performance of a continuous duty extending over a period longer than three years from its date.

Held, granting an order restricted to the negative covenants pending the disposal of the arbitration proceedings between the parties:

(1) The plaintiff had established that there were serious issues to be tried. Whether cl 3 of the agreement ought to be rectified to reflect the true intentions of the parties was a serious issue to be tried. The fact as to whether the defendant was estopped from denying that the agreement had been extended in view of the conduct of the defendant before the signing of the agreement and after the expiry of the initial period was also a serious issue to be tried. Further, based on the defendant's oral assurances the plaintiff had expended as additional sum of RM500,000 for the phase 2 adventure activities. Thus, the defendant's failure to commence the phase 2 activities was another serious issue to be tried (see para 27(k)–(n)).

(2) As the arbitration proceedings had commenced with the defendant giving notice on 9 March 2010, the interlocutory prohibitory injunction ought to be granted to the plaintiff to maintain the status quo of the matter. In this case, the balance of convenience lay in favour of the plaintiff. Without the grant of the injunction the plaintiff would suffer unnecessary costs and wastage in that it would be forced to dismantle and remove the structures presently in place for the operation of the activities and then may need to expend time, cost and effort to put the same back in place to resume operation in the event that it succeeded in the arbitration proceedings. The defendant, on the other hand, had failed to show the kind of irreparable damage it contended it would suffer if the

interlocutory injunction was granted. Further, the interlocutory prohibitory injunction sought by the plaintiff would not grant it the full relief it was seeking in the arbitration case (see para 27(o)–(p), (s)).

(3) The defendant's contention that the contract sought to be extended could not be specifically enforced under s 20(1)(g) of the SRA because it involved the performance of a continuous duty by the defendant was a point that was not taken up in its affidavits. As such the plaintiff did not have the opportunity to adduce evidence to rebut the defendant's allegations. Further the defendant had failed to identify the nature and scope of the continuous duty envisaged for each of the five activities in this case. Although it was found that the provisions of s 20 of the SRA could not be invoked in this case, the arbitrator would be in a better position to determine this issue. In any case the plaintiff only sought to, inter alia, renew the agreement upon the existing terms pending the arbitration proceedings and this would not amount to a new contract where the defendant was required to perform a continuous duty for a period of three years (see paras 28, 29(a), (c) & 34).

(4) As the defendant was holding over the lease of the tower land, it was only fair and equitable that the plaintiff should be allowed to continue its operations. The order was thus restricted to the negative covenants to be observed by the defendant, ie in restraining the defendant from interfering or obstructing the operations of the plaintiff's business as stipulated in the agreement, without the defendant having to perform any positive acts in favour of the plaintiff (see paras 36 & 38).

[Bahasa Malaysia summary

Plaintif telah menandatangani perjanjian kerjasama ('perjanjian') dengan defendan, pemajak tanah di mana terletaknya Menara KL ('tanah menara'), untuk membangunkan dan menjalankan lima kegiatan pengembaraan sebagai sebahagian daripada fasa 1 pembangunan Menara KL. Adalah syarat perjanjian bahawa defendan akan membangunkan dan melaksanakan kegiatan fasa 2 serentak atau selepas bermulanya kegiatan fasa 1 atas kos defendan. Di bawah fasal 3 perjanjian, tempoh permulaan perjanjian adalah tiga setengah tahun, yang tamat pada 31 Mei 2009 ('tempoh permulaan'), dengan defendan diberikan pilihan memperbaharui perjanjian untuk dua tempoh lanjutan selama sepuluh tahun setiap pelanjutan, tertakluk kepada pajakan tanah yang diserahkan bagi pihak defendan. Setelah tamat tempoh permulaan itu defendan telah membenarkan plaintif meneruskan kegiatan pengembaraannya, tetapi melalui surat penamatan bertarikh 9 Disember 2009 defendan berkeras agar plaintif menamatkan operasi perniagaannya pada 21 Mac 2010 dan menyerah milikan kosong premis itu. Oleh sebab defendan enggan membenarkan plaintif meneruskan operasinya dan kerana defendan enggan memulakan dan membiayai kegiatan fasa 2 meskipun pelbagai peringatan dibuat, plaintif telah memberi notis kepada defendan untuk

merujuk pertikaian tersebut kepada timbang tara. Sementara menunggu prosiding timbang tara selesai plaintif memohon injunksi ini untuk melindungi status quo perkara tersebut. Plaintif berhujah bahawa niat sebenar pihak-pihak adalah untuk terlibat dalam hubungan perniagaan jangkamasa panjang dan berdasarkan perlakuan pihak-pihak defendan telah diestopkan daripada menamatkan kontrak melalui notis penamatannya bertarikh 9 Disember 2009. Plaintif berhujah bahawa jika defendan dibenarkan melanggar hak eksklusif plaintif untuk meneruskan operasi kegiatan pengembaraan dan plaintif terpaksa mengalih semua pemasangan dan strukturnya ia akan mengalami kerugian yang tidak boleh dipulihkan tetapi tiada kerugian yang tidak boleh dipulihkan ke atas defendan kerana tiada bukti bahawa tanah menara itu diperlukan untuk apa-apa tujuan lain. Defendan menegaskan, antara lain, bahawa injunksi interlokutori yang dipohon oleh plaintif sebenarnya injunksi interlokutori mandatori kerana plaintif memohon untuk memperbaharui perjanjian, yang telahpun luput ada 31 Mac 2009, dengan mendesak defendan menarik balik notis mereka agar tidak memperbaharui perjanjian itu; dan bahawa dengan membenarkan injunksi itu akan memberikan plaintif relief penuh dan muktamad yang dipohon untuk diperoleh di perbicaraan timbang tara. Defendan juga berhujah bahawa plaintif tidak bergantung kepada perjanjian tetapi atas apa yang diniatkan pihak-pihak sebelum perjanjian, dan yang telah membentuk perjanjian baru dan berasingan yang berbeza daripada perjanjian yang ditandatangani pihak-pihak. Oleh itu defendan menegaskan bahawa kontrak yang secara tidak langsung disebutkan oleh plaintif tidak boleh dikuatkuasakan secara spesifik di bawah s 20(1) Akta Relief Spesifik 1950 ('Akta'), yang menyatakan bahawa kontrak tidak boleh dikuat kuasakan secara spesifik kecuali ia melibatkan pelaksanaan kewajipan berterusan yang dilanjutkan untuk tempoh melebihi tiga tahun dari tarikhnya.

Diputuskan, membenarkan perintah terbatas kepada waad negatif sementara menunggu prosiding timbang tara selesai antara pihak-pihak:

(1) Plaintif telah membuktikan bahawa terdapat isu-isu penting yang perlu dibicarakan. Sama ada fasal 3 perjanjian patut dibetulkan untuk menggambarkan niat sebenar pihak-pihak adalah isu penting yang peru dibicarakan. Fakta sama ada defendan diestopkan daripada menafikan bahawa perjanjian telahpun dilanjutkan berdasarkan perlakuan defendan sebelum menandatangani perjanjian dan selepas tamat tempoh permulaan juga isu penting yang perlu dibicarakan. Selanjutnya, berdasarkan jaminan lisan defendan, plaintif telah membelanjakan jumlah tambahan RM500,000 untuk kegiatan pengembaraan fasa 2. Oleh itu, kegagalan defendan untuk memulakan kegiatan fasa 2 adalah satu lagi isu penting yang perlu dibicarakan (lihat perenggan 27(k)–(n)).

(2) Oleh sebab prosiding timbang tara telah dimulakan dengan defendan memberikan notis pada 9 Mac 2010, injunksi larangan interlokutori

patut diberikan kepada plaintif bagi mengekalkan status quo perkara tersebut. Dalam kes ini, imbangan kesesuaian terletak menyebelahi plaintif. Jika injunksi tidak diberikan plaintif akan mengalami kos dan pembaziran yang tidak sepatutnya di mana ia akan terpaksa membuka dan mengalihkan struktur sedia ada untuk operasi kegiatan dan mungkin memerlukan masa, kos dan usaha untuk memasang semula yang sama bagi meneruskan operasi sekiranya ia berjaya dalam prosiding timbang tara. Defendan, sebaliknya, telah gagal menunjukkan kerugian yang tidak boleh dipulihkan yang ditegaskan akan dialaminya jika injunksi interlokutori itu dibenarkan. Selanjutnya, injunksi larangan intelokutori yang dipohon oleh plaintif tidak memberinya relief penuh yang dipohonnya dalam kes timbang tara (lihat perenggan 27(o)–(p), (s)).

(3) Hujah defendan bahawa kontrak yang dipohon untuk dilanjutkan tidak boleh dikuat kuasakan secara spesifik di bawah s 20(1)(g) Akta kerana ia melibatkan pelaksanaan kewajipan berterusan oleh defendan yang merupakan perkara yang tidak dikemukakan dalam afidavit-afidavitnya. Oleh itu plaintif tidak mempunyai peluang untuk mengemukakan keterangan untuk mematahkan pengataan defendan. Selanjutnya defendan telah gagal mengenalpasti sifat dan skop kewajipan berterusan yang dijangkakan untuk setiap lima kegiatan dalam kes ini. Meskipun didapati bahawa peruntukan s 20 Akta tidak boleh digunakan dalam kes ini, penimbangtara mempunyai kedudukan lebih baik untuk menentukan isu ini. Dalam apa keadaan plaintif hanya memohon untuk, antara lain, memperbaharui perjanjian berdasarkan syarat-syarat yang wujud sementara menunggu selesai prosiding timbang tara dan ini tidak membentuk kontrak baru di mana defendan dikehendaki melaksanakan kewajipan berterusan untuk tempoh tiga tahun (lihat perenggan 28, 29(a), (c), & 34).

(4) Oleh sebab defendan memegang pajakan tanah menara, ia hanyalah adil dan saksama jika plaintif dibenarkan meneruskan operasinya. Perintah dengan itu terbatas kepada waad negatif yang perlu diteliti oleh defendan, iaitu menyekat defendan daripada mengganggu atau menghalang operasi perniagaan plaintif sepertimana ditetapkan dalam perjanjian, tanpa defendan perlu melaksanakan apa-apa tindakan positif bagi pihak plaintif (lihat perenggan 36 & 38).]

Notes

For cases on injunction, see 3(1) *Mallal's Digest* (4th Ed, 200 Reissue) paras 5200–5201.

For cases on interlocutory injunction, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3544–3691.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Bee Ya Hock @ Beh Ah Hock v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia [1994] 2 CLJ 753, HC (refd)
Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533, HC (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)
Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)
Joscelyne v Nissen and another [1970] 1 All ER 1213, CA (refd)
Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193; [1995] 1 CLJ 293, CA (refd)
Tan Suan Choo v Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323, HC (refd)

Legislation referred to

Arbitration Act 2005 s 11(1), (1)(h), (g)
Rules of the High Court 1980 O 29 rr 1, 2
Specific Relief Act 1950 ss 20, 20(1)(g), 54, 54(f)

Yap Boon Hau (Mah-Kamariyah & Philip Koh) for the plaintiff.
Khoo Guan Huat (Jeffri Cheong with him) (Skrine) for the defendant.

Mah Weng Kwai JC:

[1] The plaintiff by its originating summons (encl 4) dated 19 March 2010 sought an interlocutory prohibitory injunction pursuant to s 11(1)(f) and/or (g) and/or (h) of the Arbitration Act 2005 and/or O 29 r 1 and/or r 2 of the Rules of the High Court 1980 pending the disposal of the dispute by arbitration between the parties to restrain or prevent the defendant and/or its agents, employees or officers from:

(a) terminating or discontinuing the collaboration agreement dated 27 January 2006;

(b) interfering or obstructing the operations of the plaintiff's business; and

(c) notifying and/or informing the public that the plaintiff's business has been terminated and/or discontinued.

BRIEF FACTS

[2] The defendant is the lessee of the land along Jalan Bukit Nenas, Kuala Lumpur owned by the Government of Malaysia ('the Tower land') on which the Menara Kuala Lumpur ('the KL Tower') is located and of the KL Tower itself which is owned by Telekom Malaysia Bhd.

[3] The plaintiff entered into a collaboration agreement with the defendant to develop, install and operate at least five adventure activities known 'the sky walk, twin flying foxes, mast climb, reverse bungy sling shot' in phase 1 and the 'sky jump and bungy jump' in phase 2 at the KL Tower.

[4] The initial period of the collaboration agreement was three years which lapsed on 31 May 2009 ('the initial period'). It was a term of the contract that the duration of the collaboration agreement may be renewed at the option of the defendant for two further terms of ten years each, subject to the lease of the Tower land including the KL Tower being extended in favour of the defendant, pursuant to cl 3 of the collaboration agreement. Clause 3 of the collaboration agreement reads:

> Unless sooner terminated pursuant to clause 11 thereto, this Agreement shall commence on the Effective Date and shall continue in full force and effect for an initial term until 31 May 2009 and may be renewable at the option of MKLSB for two further terms of 10 years each thereafter, subject to the lease or rights to the Tower Land including the KL Tower being granted to MKLSB for the duration of the extended terms.

[5] It was the intention of the parties or at the very least the understanding of the plaintiff that the defendant could only refuse to renew the collaboration agreement if the relevant authorities did not extend the lease of the Tower land held by the defendant.

[6] Notwithstanding the expiry of the collaboration agreement on 31 May 2009, the defendant allowed the plaintiff to continue with its adventure activities from 1 June 2009.

[7] However, on 9 December 2009, the defendant wrote to the plaintiff informing that they wished to terminate the collaboration agreement. By letter dated 17 March 2010, the defendant insisted that the plaintiff cease its business operations by 21 March 2010 and to deliver vacant possession of its premises.

[8] It was a term of the collaboration agreement that the defendant would set up and implement the phase 2 activities concurrently with or soon after the commencement of the phase 1 activities at the defendant's cost.

[9] The plaintiff completed and commenced operations of the phase 1 activities but the defendant refused and/or failed to set up and implement the phase 2 activities at its own cost.

[10] As the defendant had failed to commence and fund the phase 2 activities, the plaintiff has been suffering losses from the non-operation of the phase 2 activities and from the lack of potential customers of the phase 1 activities.

[11] As the defendant has refused to allow the plaintiff to continue with its operations after 31 May 2009 and as the defendant has refused to commence and fund the phase 2 activities after numerous reminders, the plaintiff gave notice to the defendant to refer the dispute to arbitration on 19 March 2010 that is, just two days after the defendant had given notice to the plaintiff to cease all its business operations.

[12] Pending disposal of the arbitration proceedings, the plaintiff sought an injunction to preserve the status quo of the matter, inter alia, on the following grounds:

(a) irreparable injury will be caused to the plaintiff if the defendant took steps to interfere with or interrupt the plaintiff's business operations before the conclusion of the arbitration proceedings;

(b) there are serious questions to be tried;

(c) the balance of convenience lies in favour of the grant of the interlocutory injunction;

(d) there will be no prejudice to the defendant if the order is granted; and

(e) in view of the justice of the case.

THE PLAINTIFF'S CASE

[13] The plaintiff served the notice of arbitration to the defendant seeking declaratory relief that the collaboration agreement be renewed and for specific performance of the same.

[14] Before the collaboration agreement was signed, and upon the request of the defendant that the operation of the adventure activities be set in place as quickly as possible, the plaintiff invested about RM2m to set up and operate the phase 1 activities.

[15] By cl 3 of the collaboration agreement, the plaintiff understood the clause to mean that only in the event the defendant's lease of the Tower land was not extended, then the plaintiff would not be allowed to continue with the operations of its adventure activities.

[16] Upon the expiry of the initial period, the parties exchanged correspondence on the relocation of the site office which indicated the defendant's intention to allow the plaintiff to continue with its business operations. It was only by letter dated 9 December 2009 that the defendant gave notice to the plaintiff to cease all operations on the ground that the collaboration agreement had expired.

[17] Counsel for the plaintiff submitted that the plaintiff would apply to rectify cl 3 of the collaboration agreement at the arbitration proceedings to reflect the true intention of the parties on the entire duration of the collaboration agreement.

[18] Counsel contended that the defendant is estopped from denying any extension of the collaboration agreement in view of the position taken by the defendant immediately before and after the expiry of the initial period on 31 May 2009. Counsel referred to the Court of Appeal case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where Gopal Sri Ram JCA (as he then was) held:

> It is not an integral part of the doctrine of estoppel that a litigant who invokes the doctrine of estoppel must prove that he was induced by the conduct of his opponent to act in a particular way, as all that a representee need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Likewise, the requirement that the representee should have acted to his detriment is also not part of the doctrine. In this respect, all that needs to be shown is that, in the particular circumstances of a case, it would be unjust to permit the representor or encouragor to insist upon his strict legal rights.

[19] Due to the various statements made by the defendant's former chairman that the sky jump activity would be implemented in August 2006, the plaintiff invested an additional sum of RM500,000 in anticipation of the commencement of the phase 2 activity.

[20] The defendant is estopped from stating that there is no board of director's resolution to approve the phase 2 activities when the collaboration agreement stipulates that the phase 2 activities must be commenced concurrently with the phase 1 activities. The board of directors having approved the collaboration agreement must be taken to have approved the phase 2 activities as well.

[21] Counsel for the plaintiff contended that the following, inter alia, are serious questions to be tried:

(a) whether the true intention of the parties was to engage in long term business relationship for a term of at least 23 1/2 years;

(b) whether on a proper construction of the collaboration agreement and based on the conduct of the parties, the defendant is estopped from terminating the contract by letter dated 9 December 2009;

(c) whether the defendant has agreed to renew or extend the contract for another two terms of ten years each;

(d) whether the defendant had approved the phase 2 activities; and

(e) whether the defendant had breached the collaboration agreement by failing to fund and commence the phase 2 activities.

Balance of convenience

[22] Counsel for the plaintiff contended that the plaintiff would suffer irreparable damage if the injunction is not granted as:

(a) the defendant may violate the exclusive right of the plaintiff to continue operation of the adventure activities;

(b) the plaintiff would be compelled to remove all its installations and structures;

(c) the plaintiff's claim for specific performance will be nugatory; and

(d) the livelihood of the plaintiff's ten employees would be affected.

[23] Counsel for the plaintiff further contended:

(a) that the plaintiff's reputation as well as the brand name of 'AJ Hackett' would be tarnished by the termination of the collaboration agreement;

(b) that plaintiff's plan to expand its business operations to include the Alor Star Tower will be affected adversely thereby suffering loss of business opportunity which cannot be adequately compensated by damages;

(c) that the plaintiff will suffer loss of profits for the next 20 years;

(d) that the plaintiff will suffer an estimated loss of about RM139m from the sky jump activity alone and that this loss will exceed the entire assets of the defendant;

(e) that the plaintiff should not be limited to the remedy of damages only; and

(f) that there will be no irreparable harm done to the defendant as there is no evidence that the Tower land is being required for any other purposes.

THE DEFENDANT'S CASE

[24] Counsel for the defendant contended, inter alia, that:

(a) The interlocutory injunction sought by the plaintiff is in effect an interlocutory mandatory injunction in substance although the words of the proposed injunction are couched in prohibitory terms. The plaintiff seeks to renew the collaboration agreement which has already expired on 31 May 2009 by compelling the defendant to retract their notice not to renew the collaboration agreement.

(b) The granting of an injunction on the terms as claimed by the plaintiff would in fact and in substance give to the plaintiff the full and final relief sought to be obtained at the arbitration hearing. The arbitrator has the jurisdiction to make an order or finding that the collaboration agreement is continuing and in full effect which is the very subject matter of the injunction.

(c) The plaintiff is unable to show any real prospects of success at the arbitration hearing and it is trite that an interlocutory mandatory injunction would not be granted by the court before trial save in exceptional cases.

(d) The plaintiff has not shown that there are serious issues to be tried in this case.

(e) The plaintiff is relying on irrelevant conduct, communications or representations between the parties before the collaboration agreement was signed. This constitutes unenforceable extrinsic evidence in view of cl 18 which is the entire agreement clause in the collaboration agreement.

(f) Clause 3 of the collaboration agreement stipulates that the phase 2 activities can only commence upon the approval of the board of directors of the defendant and the Board of Directors of Telekom Malaysia Bhd. At all material times, the plaintiff was aware that there was no formal approval for the phase 2 activities to commence.

(g) The collaboration agreement which expired on 31 May 2009 can only be renewed at the option of the defendant for two further terms of ten years each.

(h) At all material times, the plaintiff was aware that there was no formal renewal of the lease of the Tower land. The plaintiff does not dispute that the lease has not been renewed.

(i) The balance of convenience favours the defendant and that the plaintiff is not relying on the terms of the collaboration agreement but rather on what parties had purportedly intended before the collaboration agreement was signed to be the actual duration of the contract. This in effect constitutes a separate agreement different from the collaboration agreement, the performance of which requires a continuous duty by the defendant to perform its obligations extending for a period beyond three years. As such, the specific performance of this separate agreement must

be refused pursuant to s 20 of the Specific Relief Act 1950 ('the SRA'). Section 20(1)(g) of the SRA states that a contract cannot be specifically enforced where the performance of which involves the performance of a continuous duty extending over a period longer than three years from its date.

(j) Following the invocation of the provisions of s 20(1)(g) of the SRA, counsel contended that an injunction therefore cannot be granted under s 54 of the SRA to prevent the breach of a contract, the performance of which would not be specifically enforced.

(k) The remedy of the plaintiff is to sue for damages. The plaintiff cannot compel the defendant to provide services or to assist the plaintiff based on the terms of the collaboration agreement which require extensive cooperation between the parties.

DECISION OF THE COURT

[25] Upon a consideration of encl 4 and the affidavits filed by the parties and upon hearing submissions of counsel, the court granted an order in terms of prayer 1(b) to wit, restraining the defendant from interfering or obstructing in whatsoever manner the operations of the plaintiff's business stipulated in the collaboration agreement. The order is restricted to the negative covenants only including but not limited to the defendant's ten obligations enumerated in para 12 of the defendant's supplementary submissions (2) (encl 14). An order in terms was also granted of prayer 1(c), limited to the defendant's directors.

[26] Prayers 1(b) and 1(c) were granted to the plaintiff pending the disposal of the arbitration proceedings between the parties.

REASONS FOR DECISION

[27] From the facts of the case, I arrived at the following findings:

(a) The defendant is the lessee of the Tower land which includes the KL Tower.

(b) Due to the KL Tower being one of the taller towers in the world and a significant landmark and tourist attraction in Kuala Lumpur, the plaintiff sought to enter into a long term business relationship with the defendant to set up and operate the five adventure activities comprised in phase 1 and phase 2.

(c) Negotiations were entered into between the parties culminating in the collaboration agreement being signed on 27 January 2006. Prior to entering into the collaboration agreement, the parties had intended a long term business relationship of the adventure activities of between 20

to 30 years, with the plaintiff having exclusive rights to operate the same. In order to reduce costs and to make a profit, it was intended that the plaintiff shall be given a contract of three terms of ten years each. The defendant agreed to a '10 + 10' years of tenure after the expiry of the first ten year term which had been reduced to 3 years, subject only to the extension of the lease of the Tower land to the defendant by the Government of Malaysia. It was also contemplated by the parties to have the phase 2 adventure activities commence and be operational at the same time as the phase 1 activities.

(d) To kick start the adventure activities, the plaintiff invested about RM2m to set up the operations as quickly as possible.

(e) By June 2006, the parties were aware of the uncertainty of the defendant's position in the extension of the lease of the Tower land. The plaintiff agreed that the initial period should be shortened to three years. The plaintiff would then be granted an extension of '10 + 10' years if an extension of the lease of the Tower land is given to the defendant (see encl 2 p 39). Counsel for the defendant contended that the plaintiff was seeking a renewal of the collaboration agreement for another term of three years plus '10 + 10' years. This is not factually correct.

(f) Clause 3 of the collaboration agreement was amended to mean that only the defendant had the option to continue the collaboration agreement after 3 years (see encl 2 — exh A16 p 68). The plaintiff however understood cl 3 to mean that when an extension of the lease of the Tower land is granted to the defendant then the plaintiff shall be allowed to continue with its operations.

(g) With the amendments, the plaintiff had compromised on the initial tenure of the collaboration agreement namely, from ten years to three years but did not compromise on its right to continue with the business operations when the extension of the lease of the Tower land is granted to the defendant.

(h) It is the plaintiff's case that the option to renew the collaboration agreement under cl 3 is exercisable by the defendant subject only to the extension of the lease of the Tower land.

(i) After the expiry of the initial period on 31 May 2009, the parties were still exchanging correspondence on the relocation of the site office which indicated the intention of the parties to continue with the collaboration agreement. It was only on 9 December 2009 that the defendant wrote to the plaintiff maintaining their position that the collaboration agreement had expired.

(j) A dispute having arisen between the parties on the extension of the collaboration agreement beyond 31 May 2009, the plaintiff has referred

the dispute to arbitration. The issue of whether there should be specific performance of the collaboration agreement by the defendant is an issue to be determined by the arbitrator

(k) Whether cl 3 of the collaboration agreement ought to be rectified to reflect the true intentions of the parties is a serious issue to be determined bearing in mind the principle enunciated in the English Court of Appeal case of *Joscelyne v Nissen and another* [1970] 1 All ER 1213 where the court held that:

> This was a case of rectification based on antecedent expressed accord on a point adhered to in intention by the daughter and father as parties to the subsequent written contract and since both parties were in agreement up to the moment when they executed the written contract that the daughter should pay all outgoings on Martindale, and the written contract did not conform with that agreement, the court had jurisdiction to rectify the written contract, although there may have been no concluded and binding contract between the parties until the written contract was executed.

(l) Whether the defendant is estopped from denying that the collaboration agreement has been extended in view of the conduct and position taken by the defendant immediately before the collaboration agreement was signed and after the expiry of the initial period is also a serious issue to be determined. Please refer to the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bhd*.

(m) The defendant had failed to fund and commence the phase 2 adventure activities and that, if not for the press release of the defendant's chairman that the phase 2 activities would be implemented in August 2006 and the oral promises made by the defendant's chief executive officer, the plaintiff would not have expended an additional sum of RM500,000 for the phase 2 adventure activities. Having the assurance of the defendant, the plaintiff proceeded to implement the phase 1 activities which were completed in August 2006. The defendant may therefore be estopped from stating that there is no approval from its board of directors to commence the phase 2 activities.

(n) The issue of the defendant's failure to commence the phase 2 adventure activities is also a serious issue to be determined by the arbitrator.

(o) As the arbitration proceedings have commenced with the plaintiff giving notice on 19 March 2010, it is my view that the interlocutory prohibitory injunction ought to be granted to the plaintiff to maintain the status quo of the matter. Without the grant of the interlocutory injunction the plaintiff would be forced to dismantle and remove all the features and structures put in place for the operation of the adventure activities pending the determination of the plaintiff's claim in the arbitration proceedings.

(p) In the event the plaintiff is successful in the arbitration proceedings and for them to resume and continue with the adventure activities, the plaintiff would have to expend time, cost and effort to put themselves back to square one. This will result in unnecessary costs and wastage to the plaintiff. On the other hand the defendant has failed to show the kind of irreparable damage they contend they will suffer if the interlocutory injunction is granted.

(q) In this case, the balance of convenience lies in favour of the plaintiff. If the plaintiff is not granted the interlocutory injunction and is not allowed to continue operations of the existing adventure activities, they will suffer irreparable damage. According to the defendant's own projection, the income from the sky jump activity alone is RM1.8m per year. Further, if the plaintiff is compelled to remove all its features and structures, the plaintiff's claim for specific performance will be illusory.

(r) I am satisfied that the plaintiff has in this case met the requirements of the principles set out in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193; [1995] 1 CLJ 293.

(s) Counsel for the defendant submitted that the plaintiff is in fact seeking an interlocutory mandatory injunction in substance and in effect although the application is couched in prohibitory terms. Counsel contended that the plaintiff is in fact compelling the defendant to retract its' letter of termination dated 9 December 2009 thereby compelling the defendant to renew the collaboration agreement. I am of the view that the defendant's contention is wholly untenable in this case as the plaintiff is not seeking an order to compel the defendant to retract its' letter of termination and to renew the collaboration agreement. All that the plaintiff is seeking is merely an order to restrain or prevent the defendant from interfering with or obstructing the plaintiff from carrying on with its' business operations until the arbitration proceedings are dealt with. It is simply an order to maintain the status quo so that the plaintiff will not have to dismantle the structures for the phase 1 activities and to vacate the premises pending the arbitration proceedings. In this sense the order of an interlocutory prohibitory injunction will not grant the full relief to the plaintiff which they are seeking in the arbitration case. The argument by counsel for the defendant that an interlocutory mandatory injunction would not be granted before trial save for very exceptional cases would therefore not apply in this instance. Further, the test of a standard higher than that canvassed in the case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 of an unusually strong and clear case and of special circumstances before the court, that the plaintiff is required to satisfy in an application for an interlocutory mandatory injunction would not apply as well.

(t) Counsel for the defendant contended that there are no serious issues to be tried and that the plaintiff has no real prospect of success. I am of the view that the plaintiff has established that there are serious issues to be tried and whether or not the plaintiff will be eventually successful on its claim before the arbitrator is surely not an issue for the court to adjudicate at this stage. In any event the plaintiff has the contractual right to refer the dispute to arbitration and it is not for the court to curtail this right. Also, whether or not the plaintiff can raise the issue of estoppel against the defendant by reason of its conduct before the execution of the collaboration agreement is a matter for the arbitrator to determine. It is not open for the defendant to submit at this stage that the defendant's conduct before the collaboration agreement was signed is irrelevant in view of the entire agreement clause in the collaboration agreement and that no extrinsic evidence can be referred to.

(u) I am of the view that the central issue in this case is whether or not the defendant can maintain the position that they are not at liberty to renew the collaboration agreement in light of the fact that the lease granted by Telekom Malaysia Bhd to the defendant has not been renewed, as no decision has been made by Telekom Malaysia Bhd to date. That is an issue for the arbitrator to determine. Another issue for the arbitrator to determine is whether or not the defendant is obliged to commence and fund the phase 2 activities without the formal approval of the same by the board of directors of the defendant and of Telekom Malaysia Bhd.

(v) While I do not disagree that the collaboration agreement can be terminated after the initial period, I am of the view that the discretion of the defendant not to renew the collaboration agreement may only be exercised when the lease of the Tower land has not been renewed.

(w) It would appear that the real reason for the defendant wanting the plaintiff to cease all its business operations and to vacate its premises is that the defendant is not deriving any income from the plaintiff from its phase 1 activities and at the same time the plaintiff is occupying the defendant's premises, for example its ticket booth, which space can be rented out from between RM4,000 to RM5,000 per month. In short the defendant feels that the plaintiff is leeching off them and that is why the defendant wants them to vacate their premises.

(x) While damages may be quantifiable in the event the order of injunction should not have been granted, I am of the view that such damages may not be adequate given the huge loss of income and profit, and the loss of reputation the plaintiff will suffer.

(y) The plaintiff's application is made under s 11(1) of the Arbitration Act 2005. The relief sought by the plaintiff is interlocutory or interim in nature namely to preserve the status quo of the subject matter pending

A the determination by the arbitrator in the arbitration proceedings. An interlocutory injunction is limited so as to apply only until the final hearing or final determination by the court of the rights of the parties and in this case, pending the final award by the arbitrator.

B *Operation of s 20(1)(g) and s 54 of the SRA*

[28] To decide whether the provisions of s 20(1)(g) apply in this case, the court will have of necessity to determine whether the contract sought to be C extended by the plaintiff will involve 'the performance of a continuous duty' by the defendant.

[29] I am of the view that the provisions of s 20(1)(g) cannot be invoked by the court for the following reasons:

D

(a) the defendant has failed to set out the material facts to enable the court to consider this contention.

The 'continuous duty' point was not taken up in the defendant's affidavits. What amounts to 'continuous duty' is a question of fact and E ought to be particularised in the affidavits.

In the case of *Bee Ya Hock @ Beh Ah Hock v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia* [1994] 2 CLJ 753 it was held that matters not raised in the affidavits should not be considered.

F

The instances of 'continuous duty' in this case have instead been enumerated by counsel for the defendant in his submission. The plaintiff did not have the opportunity to adduce evidence on affidavit to rebut the defendant's allegations.

G

(b) without stating the nature of the 'continuous duty' on affidavit, the court was not in a position to determine whether the duty/duties would be too onerous or difficult for the defendant to perform, regardless of the duration of the contract.

H

(c) considering that there are at least five adventure activities in this case, the defendant has failed to identify the nature and scope of the 'continuous duty' envisaged for each activity. The various activities involve different types of operations and supervision and would require different facilities. I No distinction has been made by the defendant on the 'continuous duty' required for each activity and the time required for such performance, whether within three years or a period longer than three years.

(d) the arbitrator will be in a better position to determine whether the contract can be specifically enforced under s 20(1)(g) of the SRA, after

considering the evidence of the witnesses. The court is not prepared to say at this stage that the contract is incapable of specific performance altogether or even partly.

[30] Section 54(f) of the SRA provides that 'an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced'.

[31] As I am of the view that the provisions of s 20(1)(g) of the Act cannot be invoked in this case, the provisions of s 54(f) of the Act will not apply.

[32] Moreover it was held in the cases of *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 and *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533 that s 54 of the SRA only applies to perpetual injunctions and not to interlocutory injunctions. In this case, the relief sought by the plaintiff is interlocutory or interim in nature that is, to maintain the status quo of the subject matter pending the determination of the dispute by the arbitrator.

[33] The above authorities were subsequently approved by the Court of Appeal in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* and in *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637.

Alternatively, taking for a moment the argument that the facts averred by the defendant in the affidavits is sufficient to bring it within the scope of s 20(1)(g) of the SRA, then it will be incumbent upon the court to consider:

(a) whether the court will be in a position to watch and supervise the performance of the 'continuous duty' by the defendant. By implication the 'continuous duty' referred to in s 20(1)(g) of the SRA must be taken to refer to the performance of duties which are continuous and which are difficult for the court to watch and supervise. It is only in cases where the court is 'unable to see that the work is carried out' that a contract under s 20(1)(g) of the SRA cannot be specifically enforced;

(b) whether the performance of the 'continuous duty' will cause hardship to the defendant. It will be unjust and contrary to public policy to uphold the proposition that a contract cannot be specifically enforced merely because the 'continuous duty' exceeds three years when there is no difficulty whatsoever for the court to supervise the defendant's performance and where there is no hardship whatsoever caused to the defendant. The 'continuous duty' should not refer to any form or type of duty.

(c) in cases where there is no difficulty for the Court to supervise the 'continuous duty' of the defendant or where there is no hardship caused

to the defendant, even though the contract extends beyond three years, I am of the view that s 20(1)(g) of the SRA cannot be invoked to prevent the court from granting an interlocutory injunction to the plaintiff.

(d) further, even if s 20(1)(g) of the SRA applies, the provisions of s 54(f) of the SRA cannot be invoked as the relief sought by the plaintiff in this case is for an interlocutory and not for a perpetual injunction.

[34] Counsel for the defendant contended that as far as the duration of the collaboration agreement is concerned the plaintiff was not relying on the terms of the collaboration agreement (which stipulated that the expiry of the initial period was 31 May 2009) but instead was relying on what parties had purportedly intended the duration of the contract to be. By doing so, counsel contended that this was a new contract separate from the collaboration agreement altogether and that this new contract required the defendant to perform a 'continuous duty' extending over a period beyond three years. I cannot agree with counsel's contention on this as there is no suggestion whatsoever that the plaintiff is attempting to impose a new contract with new terms on the defendant. What the plaintiff seeks to achieve at the arbitration proceedings is, inter alia, to renew the collaboration agreement upon the existing terms. This will not amount to a new contract where the defendant is required to perform a 'continuous duty' for a period beyond three years.

[35] As stated earlier, the defendant will not be compelled to do any new positive acts or provide new services in favour of the plaintiff. Although there may be a loss of confidence between the parties and the cooperation of the defendant will be required by the plaintiff in the continuance of its business operations, the status quo requirement would mean that it will be 'business as usual' for the parties without any new positive acts being performed by the defendant which acts cannot be supervised by the court. The general obligations of the defendant under the collaboration agreement will remain passive in nature.

[36] As the defendant is holding over the lease of the Tower land, it is only fair and equitable that the plaintiff should be allowed to continue its operations until such time it is conclusively established that the defendant will not be granted the extension of the lease of the Tower land.

[37] Lastly I cannot agree with counsel for defendant that the grant of an interlocutory prohibitory injunction herein will amount to a reversal of the notice given by the defendant not to renew the collaboration agreement and that this would in fact mean that the collaboration agreement has been extended.

[38] The order granted by the court in respect of prayers 1(b) and 1(c) is restricted to the negative covenants to be observed by the defendant. The court did not order the defendant to perform any positive acts in favour of the plaintiff.

An order restricted to the negative covenants pending the disposal of the arbitration proceedings between the parties granted.

Reported by Kohila Nesan